

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Case No. 08-2020-CV-01179

Danielle Mickelson, Lydia Gessele, Lonnie  
Thompson, Summer Joy Peterson, and Naina  
Agarwal,

Plaintiffs,

v.

North Dakota Department of Health,  
the Health Council of the North Dakota  
Department of Health, and Julie Wagendorf  
in her official capacity as the Food and  
Lodging Director of the North Dakota  
Department of Health,

Defendants.

**ORDER DENYING  
MOTION TO DISMISS**

**INTRODUCTION**

[¶1] This matter is before the Court on a *Motion to Dismiss* filed by the above captioned Defendants seeking dismissal of the Plaintiffs', Danielle Mickelson, Lydia Gessele, Summer Joy Peterson, and Naina Agarwal, declaratory judgment claim without prejudice on the grounds that Plaintiffs "have not exhausted their administrative remedies" by requesting reconsideration by the North Dakota Department of Health (Department) of the Department's rules under Section 28-32-16 of the Administrative Agencies Practices Act (APA). *Docket No. 44 (Motion to Dismiss and Drop Four Plaintiff Parties)* at ¶1. In addition, Defendants request that this Court "drop Plaintiffs Mickelson, Gessele, Peterson, and Agarwal as parties to this litigation because these

four Plaintiffs lack standing to bring an administrative appeal of the Department's rulemaking action under N.D.C.C. § 28-32-42.2." *Id.*

[¶2] On June 5, 2020, all of the Plaintiffs, collectively, filed a *Response* resisting the *Motion to Dismiss* on the grounds that: (1) petitioning for reconsideration would be futile given efforts taken by the Departments to enact the challenged rules; (2) the North Dakota Supreme Court has repeatedly held that exhaustion is not required for the type of claims in this case; and (3) requiring exhaustion would be an inefficient use of judicial resources by splitting up Plaintiffs claims into two separate proceedings on nearly identical issues. Further, Plaintiffs argue that the Department does not have the authority or expertise to decide Plaintiffs' ultra vires and constitutional claims. *Docket No. 55 (Plaintiffs' Opposition to Defendants' Motion to Dismiss and Request for Oral Argument)*.

[¶3] On June 12, 2020, Defendants collectively filed a *Reply* asserting that Plaintiffs have not: (1) met their burden of establishing that efforts to exhaust administrative remedies would be futile; (2) alleged a clear and unambiguous constitutional violation by the Department; and (3) alleged claims constituting pure questions of law. *Docket No. 58 (Defendants Reply to Plaintiffs' Response to Defendants Motion to Dismiss and To Drop Four Plaintiff Parties)*. In addition, Defendants assert that requiring Plaintiffs to exhaust their administrative remedies promotes judicial economy. *Id.*

[¶4] A hearing on the *Motion to Dismiss* was held on July 2, 2020, via the Zoom platform pursuant to N.D.Sup.Ct.Admin.R. 52, as supplemented by N.D.Sup.Ct.Admin. Orders 26, 27, 28, 29, 30, and 31, due to the ongoing COVID-19 pandemic. Plaintiffs

Gessele, Mickelson and Thompson appeared through their counsels, Tatiana Pino, Erica Smith, and David Chapman. Although a *Notice of Hearing* was served on all the parties through their attorneys of record, neither a representative of the Defendants, or their counsel of record, appeared at the hearing. *Docket Number 57 (Notice of Hearing – Motion Hearing via Zoom)*.

### BACKGROUND

[¶5] The background facts underlying this Action are detailed at length in the *Amended Complaint*, and in the parties' respective briefing on the present *Motion to Dismiss*. See *Docket No. 40 (Amended Complaint)*; *Docket No. 45 (Brief in Support of Motion to Dismiss and to Drop Four Plaintiff Parties)*; and *Docket No. 55 (Plaintiffs' Opposition to Defendant's Motion to Dismiss and Request for Oral Argument)*. The Court will not restate the facts as alleged in the *Amended Complaint* and outlined by the parties, but incorporates those facts by reference into this *Order*. For purposes of the *Motion to Dismiss*, the Court accepts Plaintiffs' factual allegations set forth in the *Amended Complaint* as true.

### LEGAL STANDARD

[¶6] A motion to dismiss a complaint under Rule 12(b)(6) of the North Dakota Rules of Civil Procedure tests the legal sufficiency of the statement of the claim presented in the complaint. *Ziegelmann v. Daimler Chrysler Corp.*, 2002 ND 134, ¶ 5, 649 N.W.2d 556. "Because determinations on the merits are generally preferred to dismissal on the pleadings, Rule 12(b)(vi) motions are viewed with disfavor." *Id.* A complaint "should not be dismissed unless it is disclosed with certainty the impossibility of proving a

claim upon which relief can be granted.” *Id.* A court’s scrutiny of the pleadings should be deferential to the plaintiff. *Id.*

## LAW AND DECISION

### I. Exhaustion of Administrative Remedies

[¶7] Defendants first argue that this Court lacks subject matter jurisdiction to hear Plaintiffs’ declaratory judgment claims because none of the Plaintiffs have exhausted available administrative remedies. Specifically, Defendants argue that before they can sue for relief in this Court, these Plaintiffs must first petition the Department to reconsider, amend, or repeal the new cottage food rules in accordance with Section 28-32-16 of the North Dakota Century Code.

[¶8] Section 28-32-16 of the North Dakota Century Code states:

Any person substantially interested in the effect of a rule adopted by an administrative agency or the commission may petition the agency or commission for a reconsideration of the rule or for an amendment or repeal of the rule. The petition must state clearly and concisely the petitioners’ alleged grounds for reconsideration or the proposed repeal or amendment of the rule. The agency or commission may grant the petitioner a public hearing on the terms and conditions as the agency prescribes

N.D.C.C. § 28-32-16 (emphasis added). Nothing in Section 28-32-16 states that any person substantially interested in the effect of a rule must petition for reconsideration before seeking judicial relief. Section 28-32-16 simply gives an interested party the option to do so. “When appellate processes are available and the remedies will provide adequate relief, those remedies must be exhausted before seeking judicial remedies, unless exhaustion would be futile. *Brown v. State ex rel. State Bd. of Higher Educ.*, 2006 ND 60, ¶ 8, 711 N.W.2d 194, 197 (emphasis added).

[¶9] Here, based on the facts pled in the *Amended Complaint*, which the Court accepts as true for purposes of the *Motion to Dismiss*, the Department quite relentlessly pursued the challenged rules/restrictions regarding cottage foods for three years.

*Docket No. 40 (Amended Complaint)* at ¶¶ 31-36. The Department tried to impose the restrictions in three ways: (1) through HB 1433, (2) through its failed rules in 2018, and (3) through SB 2269. *Id.* On its fourth attempt, the Department succeeded when it enacted the current rules in January 2020. *Id.* Over the course of the three years, the Department strongly persisted in its efforts to enact the restrictions on cottage foods, despite opposition. *Id.*

[¶10] Much of the opposition the Department faced turned on the same claims the Plaintiffs raise in this case; specifically, that its proposed restrictions contradicted the 2017 Cottage Food Act and arbitrarily allowed some foods, but not others. *Id.* at ¶ 34. In spite of the opposition's arguments being brought to the Departments' attention by multiple parties, the Department enacted the rules anyway.

[¶11] The North Dakota Supreme Court encountered similar issues of futility in *Kadlec v. Geendale Tp. Bd. Of Sup'rs*, 1998 ND 165, ¶¶ 22-26, 583 N.W.2d 817. In *Kadlec*, the Plaintiff asked the County Water Resource District to install a large culvert under a road next to his property. For two years, the District repeatedly refused. When the plaintiff sought a writ of mandamus to compel installation of the culvert, the District argued that plaintiff had to first exhaust his remedies by administratively appealing the District's refusal. The North Dakota Supreme Court disagreed. The Court reasoned that "[t]he record is replete with instances of [the plaintiff] . . . continuously stressing their position that the culvert should be installed." *Id.* at ¶ 23. Further, that Plaintiff

had been “confronting this dilemma for more than two years without progress, and it appears the deadlock would only have continued.” *Id.* at ¶ 26.

[¶12] Similarly in this case, the *Amended Complaint* contains numerous allegations of instances of the Plaintiffs, as well as other cottage food producers, legislators, and advocates, “continuously stressing their position” that the Cottage Food Act allows North Dakotans to buy and sell virtually all homemade meals and foods. *See Docket No. 40 (Amended Complaint)* at ¶¶ 20, 27-29, 32, 34, 36, 43. In spite of the strenuous opposition, the Department continued to pursue the restrictions for several years.

[¶13] Additionally, part of Plaintiffs claims in this case are that the Department did not have the authority to enact the challenged rules regarding cottage foods. *Docket No. 40 (Amended Complaint)* at ¶¶ 99-108. The *Kadlec* Court emphasized that administrative exhaustion is especially futile where the agency had no authority to decide the claims in the first place. *Kadlec*, 1998 ND 165 at ¶ 24.

[¶14] In *Kessler v. Board of Education of City of Fessenden*, 87 N.W.2d 743 (N.D. 1958), the plaintiff similarly brought a declaratory judgment action challenging an agency resolution as ultra vires. The defendants in *Kessler* argued that exhaustion was required and that a state statute required administrative exhaustion for challenges to such resolutions. However, the North Dakota Supreme Court rejected the defendant’s exhaustion argument because the plaintiff’s challenge involved “purely a legal question.” *Id.* at 749. As the Supreme Court recognized, the issue of whether an agency acted “without or in excess of its authority” is “wholly one of law.” *Id.*

[¶15] As in *Kessler*, the Plaintiffs in the present case argue that the Department of Health exceeded its statutory authority by enacting the challenged rules. Resolving this claim involves only a question of law, and the construction of the Cottage Food Act.

[¶16] Similarly, the Department has no authority to decide constitutional questions. “[T]he Administrative Agencies Practices Act is not designed to resolve constitutional questions. Neither do administrative agencies have the authority to accomplish this.” *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 584-85 (N.D. 1984).

[¶17] The Court concludes that given the well-pleaded allegation contained in the *Amended Complaint*, requiring the Plaintiffs to petition for reconsideration of the Departments rules would be a useless and futile act that would only serve to continue the deadlock between the parties. Therefore, the Plaintiffs’ declaratory judgment claim in this Court is not precluded due to any alleged failure to petition the Department for reconsideration of its new cottage food rules.

## **II. Exhaustion of Administrative Remedies for Plaintiff Thompson**

[¶18] Defendants also argue that Plaintiff Lonnie Thompson (Thompson) should exhaust his administrative remedies by proceeding with his claims in an administrative appeal instead of as a declaratory judgment action. Although conceding that Thompson participated in the underlying rule-making process, Defendants argue that Thompson’s appropriate remedy is an administrative appeal from that process to this Court.

[¶19] Under Section 28-32-42 of the North Dakota Century Code,

Any party to any proceeding heard by an administrative agency, except when the order of the administrative agency is declared final by any other statute, may appeal from the order within thirty days after notice of

the order has been given as required by section 28-32-39. If a reconsideration has been requested as provided in section 28-32-40, the party may appeal within thirty days after notice of the final determination upon reconsideration has been given as required by sections 28-32-39 and 28-32-40. If an agency does not dispose of a petition for reconsideration within thirty days after the filing of the petition, the agency is deemed to have made a final determination upon which an appeal may be taken.

N.D.C.C § 28-32-42 (emphasis added). Rather than appealing the Department's decision-making process, however, Thompson seeks to challenge the Department's authority to decide his legal claims.

[¶20] Courts have broad discretion to waive exhaustion requirements, including when doing so would waste judicial resources. *See Kadlec*, 1998 ND 165 at ¶ 25. "Whether 'exhaustion of remedies' applies in each case depends on a mixed bundle of considerations, including, but not limited to, expertise of administrative bodies, statutory interpretation, pure questions of law, constitutional issues, discretionary authority of the courts, primary, concurrent, or exclusive jurisdiction, inadequacies of administrative bodies, etc." *Id.* (internal citations omitted).

[¶21] Here, requiring Thompson to pursue an administrative appeal prior to bringing his claims for declaratory relief would result in a waste of judicial resources. The administrative record is currently incomplete as to the issues addressed by the Plaintiffs, including Plaintiff Thompson, as it consists only of the rulemaking process the Department underwent between August 2019, when the Department first proposed the current rules, and December 2019 when it enacted the rules. Therefore, the administrative record only contains a small piece of this three-year long controversy. For example, the record is missing key information concerning HB 1433, documents



about the Department's failed efforts to enact nearly identical rules in 2018, and legislative records for SB 2269. This evidence can easily be brought into the record in this case if Plaintiff Thompson's claims proceed as a declaratory judgment action.

[¶22] Additionally, requiring Plaintiff Thompson to proceed through the administrative appeal process would result in duplicative proceedings. For the reasons stated above, the remaining Plaintiffs' declaratory judgment claim are not precluded due to any alleged failure to petition the Department for reconsideration of its new cottage food rules. If this Court were to allow the four Plaintiffs to move forward without petitioning for reconsideration, but the Court still required Thompson to pursue an administrative appeal on the same issues, there would be two simultaneous actions in this Court on nearly identical issues.

[¶23] The Court concludes that requiring an administrative appeal would not serve its intended purpose in this case and would instead waste both judicial and party resources. Therefore, all five Plaintiffs are permitted to move forward with the current declaratory judgment action.

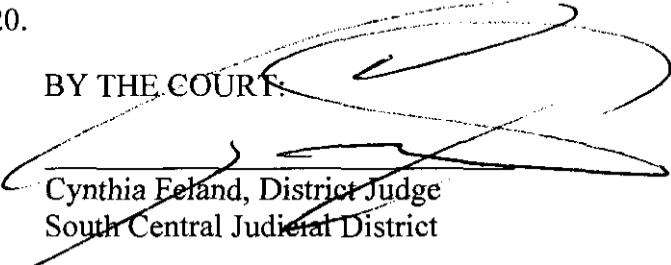
### CONCLUSION

[¶24] For the foregoing reasons, the Defendants' *Motion to Dismiss* is hereby DENIED.

IT IS SO ORDERED.

Dated this 3<sup>rd</sup> day of August, 2020.

BY THE COURT:

  
Cynthia Eeland, District Judge  
South Central Judicial District